

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA OSORIO

Claimant

VS.

TYSON FRESH MEATS

Self-Insured Respondent

Docket No. 1,044,956

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 23, 2010, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery. George H. Pearson, of Topeka, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) ordered respondent to provide medical treatment to claimant with Dr. Michael Yost until further order.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 20, 2010, Preliminary Hearing and the exhibits; the transcript of the deposition of Dr. Lynn Curtis taken April 21, 2010, and the exhibits; and the transcript of the Attempted Settlement Hearing held December 18, 2009, and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant failed to prove she suffered injury to her cervical spine or neck in the work-related accident which is the subject of this case.

Claimant asks that the Board affirm the Order for Medical Treatment.

The issue for the Board's review is: Did claimant prove that she suffered an accidental injury to her cervical spine or neck that arose out of and in the course of her employment with respondent?¹

FINDINGS OF FACT

Claimant does not speak English, and an interpreter was provided. She testified she worked for respondent separating meat off beef carcasses using only her hands. Claimant testified on direct examination that on June 19, 2006,² she was separating the meat from the bones when a piece of meat that had a lot of fat tissue went down a hole.³ When she tried to reach down for the fat, she held on to a bone. Then her right arm was pulled down and she heard a crack in her right shoulder.⁴ On cross examination, claimant was asked if some meat product fell from a belt and struck her shoulder, and she answered, "Yes."⁵

Claimant reported the accident to respondent and was sent to the company nurse, who gave her pain pills. She continued to work at the same job for respondent. Respondent sent her to Dr. Garrett, who she first saw on July 5, 2006. Dr. Garrett sent her back to regular duty, but on July 26, 2006, he gave her a restriction for modified duty. Claimant testified, however, that she was still performing the same job in the same way, and her condition worsened.

Claimant testified that at the time of the June 19, 2006, accident, she injured her right shoulder. Then she testified:

Q. [by claimant's attorney] When did the neck become part of the picture?

A. [by claimant] From the beginning as I was using my shoulders.

Q. Well, I thought you said it was just your shoulder at first?

A. Yes.

Q. So how much later after the shoulder injury of June 19 did the neck become part of the –

¹ Claimant's Form K-WC E-1 Application for Hearing filed March 27, 2009, alleges a series of accidents "from early 2007 through December 2007" from "[r]epetitive upper extremity movements operating the bone belt." In that pleading, claimant alleged injuries to her "neck and right shoulder." Claimant repeats these same allegations in its brief to the Board (filed Sept. 30, 2010).

² At the August 20, 2010, preliminary hearing, Judge Avery announced that this is a claim for a July 26, 2006, accidental injury. P.H. Trans. at 4.

³ In respondent's brief to the Board (filed Sept. 20, 2010) at 1, respondent admits that "claimant suffered . . . injury to her right shoulder in an accident that occurred on June 18, 2006."

⁴ P.H. Trans. at 8.

⁵ P.H. Trans. at 20.

A. After the surgery, I didn't feel anything because I wasn't doing anything. But then the pain came more and more.

...

Q. How much later after that did your neck start to bother you?

A. A bit after the surgery.⁶

Later, the following testimony was held:

Q. [by claimant's attorney] Go ahead. The neck and shoulder were hurting from the very beginning, both.

A. [by claimant] Yes.

Q. But the neck got worse after the shoulder surgery?

A. Yes.

Q. After you had returned to doing the job again.

A. Uh-huh.⁷

Although on direct examination claimant testified she told no doctors, other than Dr. Yost, about her neck problems, she later testified that she also told both Dr. Richard Rattay and Dr. Peter Bieri.

Dr. Garrett referred claimant to Dr. Rattay. She first saw Dr. Rattay on March 23, 2007, and he performed surgery on her shoulder on April 2, 2007. She was released to return to work on June 18, 2007, and was released from medical treatment on August 17, 2007. She went back to the same job she had before and did that job until she was laid off in either February or April 2008.

Dr. Rattay's medical records from March to August 2007 do not indicate that claimant ever told him that she was having problems with her neck. Claimant, however, testified that she told him from the beginning that she had problems with her neck. She testified that her neck pain became worse after the surgery. Claimant saw Dr. Rattay again on April 8, 2008, after she had been laid off from respondent. She had a second surgery on her finger and wrist, and she followed up with Dr. Rattay until her release on August 1, 2008. None of those medical records mentioned that she complained of a neck problem.

Dr. Lynn Curtis, who is board certified in physical medicine and rehabilitation, examined claimant on April 28, 2009, at the request of claimant's attorney. Claimant told Dr. Curtis that she developed pain in her right shoulder in early 2007. She described her pain as a burning sensation. Reaching for heavy pieces of fat made her shoulder worse, and she felt her shoulder pop at one point while she was trying to pull fat. Claimant told Dr. Curtis that she had no treatment regarding her neck problems. Dr. Curtis noted that

⁶ P.H. Trans. at 11-12.

⁷ *Id.* at 15.

claimant had a positive AC compression test on the right shoulder, which caused pain to radiate up into her neck. He made no diagnosis concerning claimant's neck problems but noted she had residual neck problems.

Claimant was seen by Dr. Bieri on August 31, 2009, at the request of the ALJ. Claimant told him her main complaint was her right shoulder. She said she had pain that radiated into her wrists and fingers. There is nothing in Dr. Bieri's report that indicates claimant told him she had injured her neck. Claimant testified that she told Dr. Bieri about her neck.

Claimant again went back to see Dr. Rattay on April 27, 2010, for a follow up of her "neck rt shoulder" problems.⁸ At that time, she complained of more right shoulder pain, and Dr. Rattay sent her for another MRI of her shoulder. She also complained of right sided neck pain and trapezial pain.

When claimant returned to visit with a doctor about the MRI results, she found that Dr. Rattay had left the area, and she was seen instead by Dr. Yost. Claimant testified that Dr. Yost wants to do an MRI on her neck because he thinks that her injuries are from the neck down to the shoulder. She admitted Dr. Yost is the only physician who has suggested that she have an evaluation of her neck.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁰

⁸ P.H. Trans., Resp. Ex. C at 1.

⁹ K.S.A. 2009 Supp. 44-501(a).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹¹

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹² Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹³

ANALYSIS

Claimant's testimony concerning her dates of injury and onset of symptoms has been erratic to say the least. In general, however, claimant testified to a specific accident at work on July 19, 2006, followed by a series of aggravations from performing her regular work duties thereafter, and in particular a worsening following her shoulder surgery of April 2, 2007. Claimant's last day of work for respondent was in February or April 2008. Claimant's Application for Hearing, however, alleged a series from early 2007 through December 2007. Respondent admits a single date of accident of June 18, 2006. The ALJ used an accident date of July 26, 2006.

Claimant's history of injuring her neck at the same time that she injured her right shoulder in June 2006 is not supported by the medical records of the treating physicians. The first mention of neck complaints appears in the report of the April 28, 2009, examination by Dr. Curtis. Claimant did mention neck complaints to Dr. Rattay and Dr. Yost, but not until 2010. And inexplicably, claimant failed to mention neck complaints to

¹¹ *Id.* at 278.

¹² K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹³ K.S.A. 2009 Supp. 44-555c(k).

the court-ordered medical examiner, Dr. Bieri, when he saw her in August 2009. The absence of neck complaints in all the medical records while claimant was still working for respondent contradicts her allegation of a neck injury from either the accident of June 19, 2006, or due to a series of work-related aggravations. Claimant has failed to carry her burden of proving a causal connection between her current neck complaints and her accident of June 2006 or her subsequent work activities with respondent.

CONCLUSION

Claimant failed to prove she suffered personal injury to her cervical spine or neck that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery dated August 23, 2010, is reversed with respect to treatment of the neck and/or cervical spine. This Order is not intended to affect the ALJ's authorization of Dr. Yost for treatment of claimant's right upper extremity, including the shoulder.

IT IS SO ORDERED.

Dated this _____ day of November, 2010.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge